APPENDIX

UNITED STATES COURT OF APPEALS
For the Third Circuit

No. 81-2898

DONALD EUGENE GARDNER, SR., Debtor
(Bankruptcy No. 81-75)

COMMONWEALTH OF PENNSYLVANIA, DEPT. OF PUBLIC WELFARE, HOUSEHOLD FINANCE CONSUMER DISCOUNT CO., YORK FEDERAL CONSUMER DISCOUNT CO., AND DAVID S. AUGUST D.D.S., INTERVENOR: UNITES STATES OF AMERICA

Commonwealth of Pennsylvania,
Department of Public Welfare,
Appellants

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF PENNSYLVANIA – PITTSBURGH

Argued July 27, 1982

Before: GIBBONS and HUNTER, *Circuit Judges*, and LORD,* *District Judge*

(Opinion Filed August 11, 1982)

Jason W. Manne (Argued)
Assistant Counsel
Department of Public Welfare
Office of Legal Counsel
Room 323 Health & Welfare Bldg.
Harrisburg, Pennsylvania 17120
Attorneys for Commonwealth of Pennsylvania Department of Public Welfare

Eric L. Frank, Esquire (Argued)
Community Legal Services, Inc.
Law Center Northeast
3156 Kensington Avenue
Philadelphia, Pennsylvania 19134

Joseph Colavecchi, Esquire
Two East Market Street
P.O. Box 131
Clearfield, Pennsylvania 16830
Attorneys for Appellee

OPINION OF THE COURT

GIBBONS, *Circuit Judge.*

The Commonwealth of Pennsylvania, Department of Public Welfare (DPW) appeals from an order of the

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* Hon. Joseph S. Lord, III, United States District Judge for the Eastern District of Pennsylvania, sitting by designation.

district court avoiding liens on the real property of Donald E. Gardner, Sr., pursuant to section 522(f)(1) of the Bankruptcy Code, 11 U.S.C. §522(f)(1) (Supp. III 1979). The Bankruptcy Court held that the DPW liens on Gardner's property at 1005 East Hay Street, York, Pennsylvania, were judgment liens avoidable to the extent that they impaired an exemption under section 522(d) of the Code, and the district court affirmed. DPW contends that its liens are either security interests or equitable or statutory liens, and not judicial liens. Alternatively it contends that if the Bankruptcy Code authorizes the Bankruptcy Court to set aside judicial liens held by a state, it violates the eleventh amendment. We affirm.

Mr. Gardner filed a voluntary petition in bankruptcy on January 15, 1981. Prior to seeking relief under Chapter 7 of the Code, 11 U.S.C. §701 *et seq.*, he had received from DPW $19,294.68 in public assistance. Because Gardner owned real property he was required by DPW to sign reimbursement agreements, Forms PA-9, as a condition to receiving such assistance. He signed six of these forms, each in the amount of $2,000. Each form contains a standard Pennsylvania confession of judgment provision authorizing entry of judgment for $2,000 plus costs, and each provides that the judgment shall be a lien upon Gardner's real property and collected as other judgments. All six forms were filed with the Prothonotary of York County from time to time beginning in October, 1972. Five of the judgment notes were revived, as Pennsylvania law permits. Thus on January 15, 1981, judgment notes totalling $12,000 were on file and were, under Pennsylvania law, liens on all Gardner's real property in York County. Gardner con-

tends, and DPW does not dispute, that if allowed to stand all but $650.00 of these liens would impair exemptions provided in Section 522(d) of the Code. The order appealed from affirms an order avoiding them except to the extent of $650.00.

DPW acknowledges that under *In re Ashe*, 669 F.2d 105 (3d Cir. 1982), a lien obtained by confessed judgment is a judicial lien avoidable under section 522(f)(1) of the Code, and not a security interest or a statutory lien. It urges, first, that *In re Ashe* should be overruled. A panel of this court is not free, however, to overrule a governing precedent in this circuit.

DPW also suggests that *In re Ashe* is distinguishable, in that it considered a judgment lien arising out of a transaction with a private creditor, while the cognovit notes it holds arise out of transactions with the Commonwealth. A proper interpretation of the Bankruptcy Code, DPW urges, is that section 522(f)(1) was not intended to apply to the states. In making that argument DPW must contend with the provision in section 106(c) of the Code which provides:

> Except as provided in subsections (a) and (b) of this section and notwithstanding any assertion of sovereign immunity--
>
> (1) a provision of this title that contains "creditor", "entity", or "governmental unit" applies to governmental units....

DPW makes the ingenious but unpersuasive argument that because section 522(f) does not contain the specific words "creditor", "entity", or "governmental unit", it cannot have been intended to apply to the states. The legislative history of section 522(f) suggests, however, that for purposes of lien avoidance no dis-

tinction was intended between governmental and non-governmental entities. *See* S. Rep. No. 95-989, 95th Cong., 2d Sess. 76 (1978) and H.R. Rep. No. 95-595, 95th Cong., 1st Sess. 362 (1977), *reprinted in* 1978 U.S. Code Cong. & Ad. News 5862, 6318. In *In re Neavear*, 674 F.2d 1201, 1204 (7th Cir. 1982), the Court concluded that "section 106(c) ... waives the sovereign immunity of the United States with respect to questions relating to the dischargeability of debts owed to the [federal] government." Governmental creditors are for most purposes treated like other creditors, and there is no suggestion that the exemption provisions in Section 522 are to apply to such creditors differently. Thus *In re Ashe*, *supra*, controls as a matter of statutory construction of section 522(f)(1).

In a second effort to distinguish *In re Ashe* DPW urges that although its reimbursement agreement takes the form of a traditional cognovit note, the lien created by the resulting judgment should be disregarded and we should define its lien as either an equitable or a statutory lien. It is neither. Under Pennsylvania law the agreement to charge specific property with the payment of a debt may give rise to an equitable lien. However, the lack of specific identity of the property intended to be affected is fatal to the creation of an equitable security interest in real estate. *In re Griggs*, 12 B.R. 443 (E.D. Pa. 1981); *In re Fortesque*, 122 F. Supp. 883 (E.D. Pa. 1954). *See also*, *Mermon v. Mermon*, 257 Pa. Super. 228, 390 A.2d 796 (1978); 22 P.L.E. *Liens* §3 at 376, 377. *Cf. R. M. Shoemaker v. Southeastern Pa. Economic Development Corp.*, 275 Pa. Super. 594, 419 A.2d 60 (Pa. Super. 1980) (undistributed loan proceeds not identified as collateral). Nor is the DPW a holder of a statutory lien. It has no

lien at all until its cognovit notes are filed with the Prothonotary as judgments. Section 101(35) of the Bankruptcy Code defines a statutory lien as a lien arising solely by force of a statute. It must be a lien arising automatically by operation of a statute, not one requiring subsequent judicial action. Pennsylvania has authorized the DPW to take cognovit notes. It has not provided that the property of recipients of public assistance is automatically subject to a reimbursement lien by operation of law.

Since *In re Ashe* controls as a matter of statutory construction, we must address DPW's eleventh amendment contention. Acceptance of that contention would require turning back the clock more than a half century. *Van Huffel v. Harkelrode*, 284 U.S. 225 (1931), holds that Congress has constitutional authority to grant a bankruptcy court power to deal with the lien of a state. That rule was reiterated in *Gardner v. New Jersey*, 329 U.S. 565, 578 (1946), and has never been doubted since. *See In re Blease*, 605 F.2d 97 (3d Cir. 1979). The *Van Huffel* and *Gardner* decisions were decided years before the Court's reinterpretation of the eleventh amendment in *Fitzpatrick v. Bitzer*, 427 U.S. 445 (1976), and *Hutto v. Finney*, 437 U.S. 678 (1978). Those cases established that if Congress intends to bind the states by a cause of action arising under federal law the eleventh amendment is no bar. *See Peel v. Florida Dept. of Transportation*, 600 F.2d 1070 (5th Cir. 1979); *Jennings v. Illinois Office of Education*, 589 F.2d 935 (7th Cir.), *cert. denied*, 441 U.S. 967 (1979). In section 106(c) of the Code Congress has made clear its intention to subject the states as lienholders to the same treatment in the bankruptcy court as is afforded other creditors. Thus even if the

issue were not settled by *Van Huffel* and *Gardner* the DPW argument would have to be rejected on the authority of *Fitzpatrick* v. *Bitzer* and *Hutto* v. *Finney*. *See also Florida Department of States* v. *Treasure Salvors, Inc.*, 50 U.S.L.W. 5056 (1982).

The judgment appealed from will be affirmed.

A True Copy:
Teste:

Clerk of the United States Court of Appeals
for the Third Circuit

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF
PENNSYLVANIA

Civil Action No. 81-1481

DONALD EUGENE GARDNER,

Plaintiff,

v.

COMMONWEALTH OF PENNSYLVANIA, DEPT. OF PUBLIC WELFARE; HOUSEHOLD FINANCE CONSUMER DISCOUNT CO.; YORK FEDERAL CONSUMER DISCOUNT CO.; and DAVID S. AUGUST D.D.S.,

Defendants.

ORDER OF COURT

AND NOW, to-wit, this day of October, 1981, following oral argument in the above-entitled bankruptcy appeal, and after careful consideraton of the parties' thorough briefs, it is hereby ORDERED, ADJUDGED, and DECREED that the June 18, 1981 judgment of the United States Bankruptcy Court for the Western District of Pennsylvania at Adv. No. 81-138 be, and hereby is, AFFIRMED. The opinion of Bankruptcy Judge Joseph Cosetti dated June 18, 1981, is adopted as the opinion of this Court.

MAURICE COHILL
United States District Judge

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE WESTERN DISTRICT OF
PENNSYLVANIA

No. 81-75
Adversary No. 81-138

IN RE: DONALD EUGENE GARDNER, SR.,
Debtor

DONALD EUGENE GARDNER, SR.,
Plaintiff

vs.

COMMONWEALTH OF PENNSYVANIA, DEPARTMENT OF PUBLIC WELFARE; HOUSEHOLD FINANCE CONSUMER DISCOUNT CO.; YORK FEDERAL CONSUMER DISCOUNT CO.; and DAVID S. AUGUST, D.D.S.,
Defendants

MEMORANDUM OPINION

On January 15, 1981 the debtor filed a Chapter 7 petition under the Bankruptcy Code. On January 28, 1981 he filed a Complaint to Avoid Liens on a house in York County, Pennsylvania and to avoid a non-possessory, non-purchase money security interest on all household furnishings and goods. A hearing was held on March 6, 1981. On that date an order was issued

by this court avoiding all liens, except for the liens of the Pennsylvania Department of Welfare, on the real property and the household furnishings and goods.

In an Answer to the Complaint, Household Finance raised a new matter, stating that it held a second mortgage on the real property; the debtor agreed that Household held a valid mortgage and the mortgage was not avoided. The issues to be resolved are: 1) Whether the lien of the Pennsylvania Department of Welfare is a judicial lien, security interest or statutory lien and if so, is it avoidable? Whether 11 U.S.C. §522(f) is unconstitutional if it is applied to avoid liens which were recorded prior to the passage of the Bankruptcy Code?

Both of these issues have been resolved by this Court in recent cases. The Court has held that the Department of Public Welfare liens are judicial liens and avoidable pursuant to 11 U.S.C. §522(f). See *In re Holt*, Bank. No. 79-1008, Adv. No. 80-851 (W.D. Pa. 1981) (opinion attached).

Secondly, in *In re Clark*, this Court held that the avoidance power under 11 U.S.C. §522(f) is not unconstitutional when it is applied retroactively. See *In re Clark*, Bank. No. 80-995, Adv. No. 80-950 (W.D. Pa. 1981) (opinion attached).

The debtor listed the real estate in question as having a market value of $15,000.00, a figure which has not been challenged by any of the parties. The property is in the name of the debtor. There are mortgages on the property totalling approximately $6452.00 and the debtor has taken a $7,900.00 exemption pursuant to 11 U.S.C. §522(d)(1) and (5). Therefore, except for $650.00, the welfare liens interfere with the

exemption and are avoided. The $650.00 that does not interfere with the exemptions is allowed to remain on the property.

An appropriate Order will be entered.

Dated at Pittsburgh, Pennsylvania this
18th day of June, 1981

(s) JOSEPH L. COSETTI
JOSEPH L. COSETTI
Bankruptcy Judge

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE WESTERN DISTRICT OF
PENNSYLVANIA

No. 81-75
Adversary No. 81-138

IN RE: DONALD EUGENE GARDNER, SR.,
Debtor

DONALD EUGENE GARDNER, SR.,
Plaintiff

vs.

COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF PUBLIC WELFARE; HOUSEHOLD FINANCE CONSUMER DISCOUNT CO.; YORK FEDERAL CONSUMER DISCOUNT CO.; and DAVID S. AUGUST, D.D.S.,
Defendants

ORDER OF COURT

AND NOW, this 18th day of June, 1981, upon the basis of the Memorandum Opinion of even date herewith, IT IS ORDERED that all the Pennsylvania Department of Public Welfare liens on the real property at 1005 East Hay Street, City of York, York County, Pennsylvania are AVOIDED pursuant to 11 U.S.C. §522(f)(1) exept for the $650.00 that does not interfere with the exemption.

(s) JOSEPH L. COSETTI
JOSEPH L. COSETTI
Bankruptcy Judge

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE
WESTERN DISTRICT OF PENNSYLVANIA

No. 79-1008
Adversary No. 80-851

IN RE: CAROLYN HOLT,
Debtor

CAROLYN HOLT,
Plaintiff

vs.

COMMONWEALTH OF PENNSYLVANIA,
DEPARTMENT OF PUBLIC WELFARE,
Defendant

MEMORANDUM OPINION

FACTS

On December 10, 1979 the debtor, Carolyn Holt, filed a petition under Chapter 7 of the Bankruptcy Code. A complaint was filed by the debtor on October 6, 1980 under 11 U.S.C. §522(f) to avoid a judgment lien against real property of the debtor located at 338 Enright Court, Pittsburgh, PA 15206. The debtor alleges that this lien impairs an exemption to which the debtor is entitled under §522(d)(1) and (5). On

October 10, 1980 the defendant, the Commonwealth of Pennsylvania, Department of Public Welfare (hereinafter "D.P.W.") filed a motion to dismiss the complaint for failure to state a claim upon which relief can be granted.

The Commonwealth presented a brief in support of its Motion to Dismiss. Additionally, the Commonwealth requested an opportunity for oral argument.

On May 15, 1981 the matter was argued. The Commonwealth submitted a second brief and a supplemental brief. The plaintiff submitted a reply brief.

On April 21, 1980, subsequent to the debtor obtaining her interest in the subject real property, a judgment was recorded against her in the Court of Common Pleas of Allegheny County, Pennsylvania at No. G.D. 75-11092 in the amount of $2,000.00. The debtor has received public assistance of one type or another for several years. As of November 30, 1980 the debtor has received $4,885.90 in cash grants. In order to receive assistance the debtor was required by the D.P.W. to sign a Pa-9 Form. The stated purpose of this form, entitled "Reimbursement Agreement", is to give the D.P.W. a lien on any real property owned by the recipient. The Pa-9 form also contains a confession of judgment clause. At present the D.P.W. has one lien against the debtor's real property in the amount of $2,000.00.

Schedule B-1 of the debtor's petition listed the market value of the house located at 338 Enright Court, Pittsburgh, Pennsylvania at $24,500.00. A mortgage of $18,000.00 on the real property is in existence as of the time of filing of this petition. The

debtor claimed as exempt $6,500.00 of equity in the real property. There was no objection to the debtor's filing of the $6,500.00 exemption.

ISSUES

Is the welfare lien a security interest within the meaning of the Code and not a judicial lien?

Is the lien held by the D.P.W. against the debtor's property a statutory lien not subject to avoidance under 11 U.S.C. §545, or a judicial lien which can be avoided under 11 U.S.C. §522(f) to the extent it impairs the debtor's exemptions?

If the D.P.W. lien is a judicial lien, does it impair an exemption of the debtor?

Do considerations of federalism bar the application of §522(f) under Tenth Amendment considerations?

CONCLUSIONS OF LAW

To determine the status which the D.P.W. lien should be accorded under the Bankruptcy Code, the court must first look to the statutory authorization for this lien and the treatment of the D.P.W. lien in state court.

The D.P.W. lien resulted from the debtor's signing of a Pa-9 Form, "Reimbursement Agreement". The authority for a Pa-9 Form is derived from 62 P.S. §1974 entitled "Property of Persons Liable for expenses Incurred for Support and Maintenance." This statute in pertinent part states:

> "(a) ... the real and personal property of any person shall be liable for the expenses of his support and maintenance ... if such property was owned

> during the time such expenses were incurred.... Any public body or agency may sue the owner of such property for moneys so expended, and any judgment obtained shall be a lien upon the said real estate of such person and shall be collected as other judgments ..."

The D.P.W. sought to invoke the remedial provisions of 62 P.S. §1974 by a "petition and rule" procedure through use of the confession of judgment clause of Form Pa-9. A "petition and rule" is a one party proceeding whereby a party simply files a petition with the court and a ruling or judgment of the court is issued against the other party. A literal reading of 62 P.S. §1974, which specifically provides "any public body or public agency may sue ... for moneys so expended," leads to the conclusion that a suit to judgment is required. *Perkins v. Yellow Cab Co.*, 49 Pa. D. & C. 2d 297 (1970). The court in *Perkins* said the legislature had intended a more restricted view of the word "sue". The *Perkins* court felt that if the legislature had intended to include "petition and rule" as a means of enforcing the D.P.W. right of action created by 62 P.S. §1974, the legislature would have so provided. This reasoning is supported by the provisions made by the legislature at §3 of the Support Law of 193 , 62 P.S. §1973, specifically providing for "petition and rule" as a means of recovery. Title 62 P.S. §1973, which provides for the liability of relatives for the support of indigents, was passed by the legislature at the same time as 62 P.S. §1974. It appears that the legislature was aware of the procedural differences between the two sections and intended to create a unique type of judgment by preventing execution against the home or furnishings during the lifetime of the

assisted person, surviving spouse or dependent children. The view by the court in *Perkins, supra*, that the legislature intended to create a right of action specifically requiring a suit to judgment prior to reimbursement, is supported by an earlier decision in *Matter of Hoffman*, 38 Pa. D. & C. 2d 577 (1966). In *Hoffman* a young boy from a family receiving aid was struck by a car and damages were awarded. The state sought to recover the benefits of this Tort judgment through the use of 62 P.S. §1974. The court in *Hoffman* took the view that the claim by the state under 62 P.S. §1974 must be reduced to judgment.

In the case *Comm. Dept. of Public Welfare v. Livingood*, 22 Pa. Commw. Ct. 530, 349 A.2d 816 (1976), the court held that the D.P.W. must bring a suit by original process in the Court of Common Pleas in order to recover amounts above the ordinary $2,000.00 lien. In *Livingood, id.*, the parties did not raise the question of whether the amount covered by the $2,000.00 lien must be brought to judgment in Common Pleas court. For this reason the court does not address the question. In *Livingood*, the D.P.W. brought suit to collect reimbursement money owed to the state after a sheriff's sale by a third party. The court followed the reasoning of *Perkins, supra, Ryan v. Hockinberry*, 42 Pa. D. & C. 2d 578 (1967), and *Matter of Hoffman, supra*, in holding that a petition for a rule to show cause was not a proper procedure in suits for reimbursement under 62 P.S. §1974. The court in *Livingood, supra* at 818, adopted the exact language of Judge Cavanaugh's opinion in *Perkins*, rejecting the D.P.W.'s view that it, the D.P.W., could enforce its rights under 62 P.S. §1974 by petition and rule as well as a suit to judgment.

In *Ryan*, the court reviewed a related section, 62 P.S. §1975, which did not specifically provide for recovery through the use of petition and rule, and held that a proceeding by a one party petition was not authorized by the statute and therefore not allowed.

In a recent case, *Shearer v. Moore*, Pa. Super. Ct. , 419 A.2d 665 (1980), the Pennsylvania Superior Court cites and supports the decision in *Perkins* but lists execution of an "Agreement and Authorization to Pay a Claim" as one of the ways which the state can recover money paid in assistance to a recipient. The Pennsylvania Superior Court stated that the Pa-176K medical assistance reimbursement form (similar to a Pa-9 Form) is merely an affirmation of the statutory liability established by 62 P.S. §1974. *Congleton v. Pa. D.P.W.*, 48 Pa. Commw. Ct. 615, 409 A.2d 1382 (1980). The court cited *Congleton* and stated that the form "does not give the Commonwealth any position other than its rightful one as a common creditor and is not tantamount to legal process." The court did not specifically define what it meant by the use of the term "common creditor".

In the *Cogleton* case, *id.*, the court dealt with an attempt by the D.P.W. through the use of a Form Pa-176K to recover benefits due the recipient under a pending Pennsylvania Workmen's Compensation claim. Although the validity of the confession of judgment clause was not in issue, the *Congleton* court ruled that "the conditioning of continued eligibility upon the signing of the form (same as in the case of a Pa-9 Form) means that execution of the affirmation is certainly not voluntary."

The only court which allowed the D.P.W. to enforce its claim established by 62 P.S. §1974 solely by

petition and rule was an Orphans' Court. *Garrison's (Minors)*, 64 Pa. D. & C. 2d 433 (1974). The judge in *Garrison's* reasoned that petition and rule was sufficient because of the special power of the Orphans' Court to exercise the exclusive and mandatory jurisdiction in the administration and distribution of real and personal property of minors' estates, 20 P.S. §711 (1972).

The Bankruptcy Code defines three types of liens —statutory liens, judicial liens, and security interests. Section 101(27) of the Code defines a judicial lien as a "lien obtained by judgment, levy, sequestration, or other legal or equitable process or proceeding." A statutory lien is defined by 11 U.S.C. §101(38) as a "lien arising solely by force of a statute on specified circumstances or conditions ... but does not include security interest or judicial lien whether or not such interest or lien is provided by or dependent on a statute and whether or not such interest or lien is made fully effective by statute." A security interest is defined in 11 U.S.C. §101(37) as a lien created by agreement. The court in *In re Brown*, 7 B.R. 479 (M.D. Pa. 1980), relying on the legislative history of the Code, H. Rep. No. 95-595, 95th Cong., 1st Sess. 312 (1977); S. Rep. No. 95-989, 95th Cong., 2nd Sess. 25 (1978); U.S. Code, Cong. & Adm. News 1978, p. 5787, ruled that "there are three kinds of liens; judicial liens, security interests and statutory liens and these categories are mutually exclusive and exhaustive except in the case of certain common law liens."

The definition of a statutory lien was not substantially changed by enactment of the new Bankruptcy Code. The legislative history of the Code confirms that 11 U.S.C. §101(38) was to have the same effect as

§1(29) of the Bankruptcy Act. S. Rep. No. 95-989, 95th Cong., 2nd Sess. 27 (1978); reprinted in 5 U.S. Code, Cong. & Adm. News 1979, pp. 5787, 5812 and 5813. Under the old Bankruptcy Act §1(29), a statutory lien by definition specifically excluded any lien provided by or dependent upon an agreement to give security whether or not such lien was provided by or dependent on a statute. Congress intended to assure by this section that consensual liens would not be subjected to any of the tests of validity prescribed by §67(c) which granted special treatment to statutory liens. H. Rep. No. 89-686, 89th Cong., 1st Sess. (1966); 2 U.S. Code, Cong. & Adm. News 1966, pp. 2442, 2460.

If a lien arises by force of statute without prior consent between the parties and does not fit the definition of a judicial lien, it will be deemed a statutory lien. After examining the statutory authority for a Pa-9 Form it is clear, based on the Code definition, that the D.P.W.'s lien is not a statutory lien. By its nature the D.P.W. lien is at best a security interest, because it appears to be an agreement (somewhat involuntary) between the parties or it is a judicial lien because of the necessity for use of legal process to bring the lien into existence. For these reasons the D.P.W. lien falls into one or both of the exceptions to a statutory lien as defined by 11 U.S.C. §101(38). *Charleston v. Wohlgemuth*, 332 F. Supp. 1175 (E.D. Pa. 1971), dealt with the constitutionality of the D.P.W. requiring the signing of a Pa-9 Form prior to receiving assistance. The court compared the New York State Welfare Department lien and ruled that the Pennsylvania D.P.W. lien is not a statutory lien.

The court in *In Re Dexter Buick-GMC Truck Co.*, 2 B.R. 242 (D. R.I. 1980), followed the definition in §1(29) and ruled that a "statutory lien" specifically excludes any lien provided by or dependent upon an agreement to give security. The court further stated that for a security interest to be present, the lien must be traceable to the property secured. It is evident in the instant case that there is some type of "agreement" between the parties and that the lien existing, as the D.P.W. argues, as of the time of signing, certainly is not traceable to the property. The Pa-9 Form makes no attempt to specifically identify any property.

A bankruptcy case which is very similar to the one at bar is *In re Natale*, 5 B.R. 454 (E.D. Pa. 1980). In *Natale*, the debtor received a loan from a police credit union. In order to obtain the loan, the debtor was required to sign a judgment note, a promissory note (with authorization to confess judgment), a consumer credit disclosure statement, and a statement of income in excess of $10,000.00. These forms were filed with the Prothonotary, who issued a *debet sine breve*, (hereinafter "D.S.B.") signifying a debt without suit or a confession of judgment. (The D.S.B. is the treatment which the state desires for its Pa-9 Form.) In *Natale*, the debtor filed a petition in bankruptcy and sought to avoid the lien. The credit union argued that the lien which arose by confession of judgment and D.S.B. was not a judicial lien but was a security interest which the parties had agreed should be created. The court in *Natale*, *id.* at 458, noted the differences between the lien definitions under the Code and stated:

While it is true that under the Code a security interest is a lien created by agreement of the parties, a judicial lien is defined as a lien obtained by other legal or equitable process or proceeding. We interpret that definition to include voluntary judicial process as well as involuntary judicial process.

The *Natale* court concluded that the lien the creditors had by virtue of a confession of judgment against the debtors was a judicial lien. The court ruled that the consumer credit disclosure form did not itself constitute such agreement, although the loan was secured by a separate security agreement on the debtor's real property. The court felt that the disclosure form did not specifically describe what real property was to secure the loan.

In the instant case, as in *Natale*, no lien arose solely by agreement of the parties. To acquire its lien, the D.P.W. at the very least had to file with the Prothonotary and confess judgment; this is judicial process according to the *Natale* court.

Another case with a factual situation almost identical to that of *Natale*, *In Re Porter*, 7 B.R. 356 (E.D. Pa. 1980), followed the same line of reasoning in concluding that a judicial lien was present.

The D.P.W. lien is not a statutory lien. Using the plain language of the Bankruptcy Code and recent court rulings, D.P.W. does not possess a security interest intended by Congress in enacting the Code. There was no voluntary intent of the debtor to create a security interest in his property. Further, to create a security interest under the Code, the intent of the parties must be clear, the property in which the interest is

to be created must be described with some degree of specificity, and one must be able to trace the specific property to the writing evidencing the security agreement. The D.P.W. Pa-9 Form is very general and does not describe specific property. The form states only that "my real and personal property is liable for repayment ..." Pennsylvania courts have held that this form constitutes only a general acknowledgment of the duty to reimburse the state. We hold that a lien arising under 62 P.S. §1974 is a judicial lien and therefore is subject to avoidance under §522(f)(1) of the Bankruptcy Code.

The D.P.W. urges the Court to find that the D.P.W. lien is a security interest because 1) it is not taken as part of the debt collection process; 2) the D.P.W. cannot execute upon its judgment; and 3) debtor has no personal liability on the judgment. For reasons similar to those discussed above, labeling this lien a security interest will not be dispositive of the issue. The lien intended here is a lien evidencing an interest in real property. As discussed above, in order to execute upon real property the D.P.W. lien must be reduced to judgment. It can have no more standing than a judgment by confession. See *Natale, supra*. The requirement of the Pennsylvania Uniform Commercial Code, 13 P.S. §§1101-9507, and Pennsylvania law on mortgages, 21 P.S. §§621-656, are not met by the welfare lien. It does not qualify as a security interest in specific property and as a lien is avoidable under §522(f)(1).

The Commonwealth raises considerations of federalism. It asks the Court to consider its interests in the welfare program as being in conflict with federal powers in bankruptcy. The Commonwealth did not

present evidence but the information is uniquely in the Commonwealth's possession; thus, for purposes of this argument, the Court will assume that the facts alleged in the Commonwealth's supplemental Brief at p. 17 are true. It recites that the Commonwealth holds $164 million in welfare liens and that $4 million of these liens are realized annually. The Commonwealth argues that the Tenth Amendment would require this Court to balance interests. It admits that the federal bankruptcy power is plenary. However, it argues that under *Commonwealth v. Liveright*, 308 Pa. 35, 161 A. 697 (1932) the administration of the public assistance program is "in the same position as the preservation of law and order" (Supplemental Brief, p. 16) and that welfare is a plenary state power. Further, the Commonwealth argues that under *National League of Cities v. Usery*, 426 U.S. 833, 96 S.Ct. 2465 (1976), if a federal statute so disrupts a state in the performance of its basic and traditional governmental functions, then the statute will be limited. In *National League of Cities*, the Federal Wage and Hour Law was challenged as it applied to employees of state and local government in their essential functions.

The Commonwealth also urges this Court to be guided by *United Transportation Union v. Long Island Railroad*, 634 F.2d 19 (2nd Cir., 1980). In that case the application of the Federal Railway Labor Act to the State owned LIRR was questioned. The Commonwealth under the teachings of these cases asks this Court to find that §522(f) so frustrates the scheme of repayment which the Commonwealth chooses to utilize that it should be nonapplicable to the Commonwealth.

The debtor argues that the Commonwealth's obligation to provide welfare involves several billion dollars and that this repayment scheme is a miniscule portion of that system. The debtor argues that the repayment of a miniscule fraction of the total expenditure on welfare in no way frustrates the State welfare scheme. The debtor argues that a Wage and Hour Act is not enacted under an enumerated federal power.

In contrast, the scheme Congress enacted in the Bankruptcy Code of 1978, which creates in §522(d) a system of federal exemptions which are then further protected under §522(f) is a central part of that new Code. If a balancing test is to be utilized, the avoiding power of §522(f) is a central focus of the Code. In contrast, the welfare liens are a very small part of the state's welfare program.

We hold that the Commonwealth has not met the burden of demonstrating that the action of §522(f) so disrupts or frustrates the State in the performance of its welfare function that the §522(f) power should be limited. Here the plenary powers of the Congress to enact a bankruptcy code are challenged. A much heavier burden of interference with plenary State powers must be demonstrated if a balancing test is to be invoked. We find none here.

An appropriate Order will be entered.

Dated at Pittsburgh, Pennsylvania this
27th day of May, 1981

(s) JOSEPH L. COSETTI
JOSEPH L. COSETTI
Bankruptcy Judge

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE
WESTERN DISTRICT OF PENNSYLVANIA

No. 79-1008
Adversary No. 80-851

IN RE: CAROLYN HOLT,

Debtor

CAROLYN HOLT,

Plaintiff

vs.

COMMONWEALTH OF PENNSYLVANIA,
DEPARTMENT OF PUBLIC WELFARE,

Defendant

ORDER OF COURT

AND NOW, this 27th day of May, 1981, upon the basis of the Memorandum Opinion of even date herewith, IT IS hereby ORDERED, ADJUDGED and DECREED that the foregoing Complaint to Avoid Judgment Liens is GRANTED.

(s) JOSEPH L. COSETTI
JOSEPH L. COSETTI
Bankruptcy Judge

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 81-2898

DONALD EUGENE GARDNER SR., Debtor
(Bankruptcy No. 81-75)

DONALD EUGENE GARDNER SR.

vs.

COMMONWEALTH OF PENNSYLVANIA, DEPT. OF PUBLIC WELFARE, HOUSEHOLD FINANCE CONSUMER DISCOUNT CO., YORK FEDERAL CONSUMER DISCOUNT CO., AND DAVID S. AUGUST D.D.S.
INTERVENOR: UNITED STATES OF AMERICA

Commonwealth of Pennsylvania, Department of Public Welfare, Appellants

(D.C. Civil No. 81-1481)

On Appeal From the United States District Court for the Western District of Pennsylvania

Present: GIBBONS and HUNTER, *Circuit Judges* and LORD, *District Judge**

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* Honorable Joseph S. Lord, III, United States District Judge for the Eastern District of Pennsylvania, sitting by designation.

JUDGMENT

This cause came on to be heard on the record from the United States District Court for the Western District of Pennsylvania and was argued by counsel on July 27, 1982.

On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the said District Court, entered October 21, 1981, be, and the same is hereby affirmed. Costs taxed against appellants.

ATTEST:
(s) Sally Mrvos
Clerk

August 11, 1982

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 81-2898

DONALD EUGENE GARDNER, SR., Debtor
(Bankruptcy No. 81-75)

COMMONWEALTH OF PENNSYLVANIA, DEPT. OF PUBLIC WELFARE, HOUSEHOLD FINANCE CONSUMER DISCOUNT CO., YORK FEDERAL CONSUMER DISCOUNT CO., AND DAVID S. AUGUST D.D.S., INTERVENOR: UNITED STATES OF AMERICA

Commonwealth of Pennsylvania,
Department of Public Welfare,
Appellants

SUR PETITION FOR REHEARING

Present: Seitz, Chief Judge, Aldisert, Adams, Gibbons, Hunter, Weis, Garth, Higginbotham, Sloviter and Becker, *Circuit Judges* and Lord,* *District Judge*

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* Hon. Joseph S. Lord, III, Chief Judge of the United States District Court for the Eastern District of Pennsylvania, on panel rehearing only.

The petition for rehearing filed by appellants in the aove entitled case having been submitted to the judges who participated in the decision of this court and to all the other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular active service not having voted for rehearing by the court in banc, the petition for rehearing is denied.

By the Court,
(s) JOHN J. GIBBONS
Judge

Dated: Sep -9 1982

IN THE UNITED STATES DISTRICT COURT
FOR THE
WESTERN DISTRICT OF PENNSYLVANIA

Bankruptcy No. 81-75
Adversary No. 81-138

IN RE: DONALD EUGENE GARDNER, SR.
Debtor

DONALD EUGENE GARDNER, SR.
Plaintiff

v.

COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF PUBLIC WELFARE; HOUSEHOLD FINANCE CONSUMER DISCOUNT CO.; YORK FEDERAL CONSUMER DISCOUNT CO.; and DAVID S. AUGUST, D.D.S.
Defendants

AGREED STATEMENT OF THE RECORD

Donald Eugene Gardner, Sr. and the Commonwealth of Pennsylvania, Department of Public Welfare, acting by and through their respective counsel, hereby stipulate and agree to the following statements of fact which shall be used to supplement the record certified to the Court:

1. Plaintiff below and appellee is Donald Eugene Gardner an individual (hereinafter "Mr. Gardner").

2. Defendant below and appellant is the Commonwealth of Pennsylvania, Department of Public Welfare (hereinafter "DPW").

3. On January 15, 1981, Mr. Gardner filed a voluntary petition for relief under Chapter 7 of the Bankruptcy Code.

4. On or about January 20, 1981, Mr. Gardner filed a Complaint to Avoid Liens held by DPW.

5. The liens Mr. Gardner sought to avoid result from confessed judgments recorded at the York County, Pennsylvania courthouse. The date of recording, recording number, amount of lien and date of revival for each of the judgments is as follows:

Date Recorded	Recording Number	Amount	Revival Date
Oct. 30, 1972	678 October Term 1972	$2,000	May 27, 1977
March 4, 1974	1246 January Term 1974	$2,000	Nov. 14, 1978
March 4, 1974	1247 January Term 1974	$2,000	Nov. 14, 1978
July 29, 1974	2250 May Term 1974	$2,000	Feb. 14, 1979
March 13, 1975	1625 January Term 1975	$2,000	Nov. 2, 1979
Feb. 27, 1976	76N 1059	$2,000	

6. Each of the above judgment liens was obtained by filing of a form Pa-9 identical to the one attached hereto as Exhibit A. Each of the form Pa-9s recorded were signed by Mr. Gardner and his wife Mary Ann Gardner.

7. Mr. Gardner owns real property in York County which is subject to the DPW liens.

8. Except for the sum of $650, the DPW liens impair an exemption to which Mr. Gardner is entitled under 11 U.S.C. §522.

9. Prior to the filing of Mr. Gardner's bankruptcy petition, he and his legal dependents had received $19,294.68 in public assistance in the AFDC category.

(s) Joseph Colavecchi
Joseph Colavecchi
2 East Market Street
P. O. Box 1028
Clearfield, PA 16830

(Attorney for Plaintiff)

(s) Jason W. Manne
Jason W. Manne
Assistant Counsel
Department of Public Welfare
Rm. 323 Health & Welfare Bldg.
Harrisburg, PA 17120
(Attorney for DPW)

EXHIBIT "A"

Record No. _____
Name _____
Address _____

REIMBURSEMENT AGREEMENT

I,
of _____ County, Pennsylvania, acknowledge that my real and personal property is liable for the repayment of public assistance (except Blind Pension) granted or to be granted to or for me and/or to or for my spouse and unemancipated minor children. It is understood that this liability does not apply to assistance received before my acquisition of such property, nor to assistance for which service is rendered in the Relief Work Program of the Department of Public

Welfare. The purpose of this agreement is to give the Department of Public Welfare a lien on any real property owned wholly or in part by me while assistance was received as above.

In order to carry out the purpose of this agreement, I authorize the Prothonotary, or any Attorney, of any Court of Record of Pennsylvania, or elsewhere, to appear and to enter judgment against me for the sum of Two Thousand Dollars ($2,000.00), plus costs. This judgment shall be a lien upon my real property, and be collected as other judgments, except as to the real and personal property comprising my home and furnishings, which home shall be subject to the lien of such judgment, but shall not be subject to execution on such judgment during my lifetime, or the lifetime of my spouse or dependent children. It is further agreed that in the event the sum of Two Thousand Dollars ($2,000.00) exceeds the amount required for repayment of assistance as set forth above, my real property shall not be liable for any greater payment than the amount of assistance received, plus costs.

It is agreed that at any time after assistance has ceased, the Department of Public Welfare will, at my written request, furnish me with a stipulation to be filed with the Prothonotary of the court having record of this judgment, setting forth the exact amount of assistance received for which my real property is liable, if such amount is less than the sum of Two Thousand Dollars ($2,000.00).

Signed, sealed and
delivered in the presence
of

_____ _____ (SEAL)
Dated _____

_____ _____ (SEAL)
Dated _____

Commonwealth of Pennsylvania PA 9-2-70(100)
Department of Public Welfare

UNITED STATES BANKRUPTCY COURT
FOR THE
WESTERN DISTRICT OF PENNSYLVANIA

In Proceedings Under Chapter 7
Bankruptcy No. 81-0075
Adversary No. 81-138

IN RE: DONALD EUGENE GARDNER, SR.,
Debtor

DONALD EUGENE GARDNER, SR.,
Plaintiff

VS

COMMONWEALTH OF PENNSYLVANIA, DEPT. OF PUBLIC WELFARE; HOUSEHOLD FINANCE CONSUMER DISCOUNT CO.; YORK FEDERAL CONSUMER DISCOUNT COMPANY; DAVID S. AUGUST, D.D.S.
Defendants

COMPLAINT TO AVOID LIENS

The Complaint of Donald Eugene Gardner, Sr., of Box 137, Houtzdale, Pennsylvania, 16651, respectfully represents:

1. This case was commenced by the filing on January 15, 1981 of a voluntary petition for relief

under Chapter 7 of Title 11 of the United States Bankruptcy Code.

2. This Complaint is filed by the Debtor under 11 USC 522(f) to avoid judicial liens on the house and lot situated in the City of York, York County, Pennsylvania, having been conveyed to Donald E. Gardner by deed recorded at York County in Deed Book 81P, Page 522 - 10905; also, to avoid a nonpossessory, nonpurchase-money security interest in all household furnishings and household goods owned by Debtor.

3. Judgment was entered against Debtor by the Commonwealth of Pennsylvania, Department of Public Welfare, P.O. Box 2675, Harrisburg, Pennsylvania 17120 on October 30, 1972, revived on May 27, 1977 in the amount of $2,000.00 and having File No. 676, October Term, 1972; on March 4, 1974, revived on November 14, 1978, in the amount of $2,000.00 and having File No. 1246, January Term, 1974; on March 4, 1974, revived on November 14, 1978, in the amount of $2,000.00 having File No. 1247, January Term, 1974; on July 29, 1974, revived on February 14, 1979, in the amount of $2,000.00, having File No. 2250, May Term, 1974; on March 13, 1975, revived on November 2, 1979, in the amount of $2,000.00 having File No. 1625, January Term, 1974; and on February 27, 1976 in the amount of $2,000.00 having File No. 76N 1059. All of the above judgments were entered of record at the York County Courthouse, York, Pennsylvania.

4. On November 17, 1976, Household Finance Consumer Discount Co. of 121 West Market Street, York, Pennsylvania 17405 entered a financing statement of record at the York County Courthouse against

Donald E. Gardner, Sr., and Maryann Gardner having File #1101, Pg. 276, Bl. 1, Book 49, covering all consumer and household goods located at 1005 Hay Street, York, Pennsylvania 17403, and which are owned by Debtor.

5. On February 28, 1978, York Federal Consumer Discount of 23 East King Street, York, Pennsylvania 17401, entered a financing statement of record at the York County Courthouse against Donald E. Gardner, Sr., and Mary Ann Gardner, having File #256, Pg. 64, Bl. 4, Book 58.

6. On March 5, 1980, York Federal Consumer Discount Company of 23 East King Street, York, Pennsylvania 17401, entered a financing statement of record at the York County Courthouse against Donald E. Gardner, Sr., having File #465, Pg. 115, Bl. 1, Book 62, covering all household and consumer goods of Debtor.

7. On January 9, 1980, David S. August, D.D.S., of Prospect Road Professional Center, 871 Clare Lane, York, Pennsylvania 17402, entered judgment against Donald Gardner in the amount of $125 having File #79-S-3827 at the York County Courthouse.

8. The judgments which have been entered in favor of Commonwealth of Pennsylvania, Department of Public Welfare; Household Finance Consumer Discount Company; York Federal Consumer Discount Company; and David S. August, D.D.S., at the Court of Common Pleas of York County, Pennsylvania would form such a lien on Debtor's equity in his house and lot, and household and consumer goods, as to impair his exemption to which the Debtor would be entitled under 11 U.S.C. 522(d).

WHEREFORE, Plaintiff prays judgment against Defendants for the cancellation and avoidance of the judicial liens against his house and lot situated in York, York County, Pennsylvania, and against the nonpossessory, nonpurchase-money security interest in his household goods and furnishings, and for such other and further relief as is just.

(s) JOSEPH COLAVECCHI
JOSEPH COLAVECCHI, ESQUIRE
Attorney for Debtor/Plaintiff

Date: January 20, 1981

Commonwealth of Pennsylvania :
: SS.
County of Clearfield :

Before me, the undersigned officer, personally appeared JOSEPH COLAVECCHI, who, being duly sworn according to law, deposes and says that he is attorney for Donald Eugene Gardner, Sr., and that he has personally investigated the averments set forth in the foregoing Complaint to Avoid Liens and that all of the averments are true and correct to the best of his knowledge, information and belief.

(s) JOSEPH COLAVECCHI
JOSEPH COLAVECCHI

Sworn to and subscribed before me
this 20th day of January, 1981.
(s) Gary W. Fisher
Gary W. Fisher, Notary Public
Clearfield, Clearfield Co., Pa.
My Commission expires Nov. 23, 1981